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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 395

EL PASO ELECTRIC COMPANY, Appellant

v.

ROBERT S. CALVERT, at al., Appellees.

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS AT AUSTIN

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No._____

EL PASO ELECTRIC COMPANY, Appellant

v.

ROBERT S. CALVERT, at al., Appellees.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin entered December 2, 1964, and submits this statement to show that The Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented:

A. OPINION BELOW

The judgment appealed from and the only opinion delivered in the courts below was delivered by the Court of Civil Appeals for the Third Supreme Judicial District of Austin, Texas in No. 11,270, a copy of which is attached hereto as Appendix A, and which is reported as: *El Paso Electric Co. v. Calvert, 385 S.W.2d 542 (Tex. Civ. App., Austin, 1964, writ ref. n. r. e.).*

B. GROUNDS ON WHICH THE UNITED STATES SUPREME COURT JURISDICTION IS INVOKED

(1) Nature of Proceedings

Appellant sued officers of the State of Texas to recover taxes paid under protest and deposited in a suspense fund as provided for all such contested tax payments by Texas statute. (Article 7057b, Vernon's Civil Statutes). The taxes were collected by the State under authority of Article 11.03, Chapter 11, Title 122A, "Taxation-General", Vernon's Civil Statutes(1960), the full text and designation of which is attached as Appendix B. That statute, Appellant contends, is unconstitutional under the Commerce Clause of the United States Constitution.

(2) Appeal Chronology

Appellant appeals from the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin in No. 11,270, (opinion attached as Appendix A) entered on December 2, 1964, affirming the judgment of the 126th Judicial District Court of Texas at Austin entered in No. 134,237 on June 11, 1964. On January 6, 1965, the Court of Civil Appeals denied Apellant's motion for rehearing. The Supreme Court of Texas in No. A-10,595 refused Apellant's application for writ of error "no reversible error" on March 24, 1965, thereby refusing to allow further appeal in State courts, and denied Appellant's motion for rehearing on that action on May 12, 1965. Notice of appeal to The United States Supreme Court was filed in the Court of Civil Appeals on June 4, 1965.

(3) Statutory Provision Conferring Jurisdiction.

This Court has jurisdiction of this appeal under 28 U. S.C. §1257(2).

(4) Cases Sustaining Jurisdiction

This Court has jurisdiction of an appeal from a Texas Court of Civil Appeals decision which upholds a state taxing statute in the face of objections to its validity under the Commerce Clause of the United States Constitution where the Supreme Court of Texas has finally refused to grant a writ of error. *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160 (1954).* See also, e. g., *General Motors Corp. v. Washington, 377 U. S. 436 (1964)* and *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).*

(5) Contested Statute

The Texas statute in question is Article 11.03, Chapter 11, Title 122A, "Taxation-General", Vernon's Civil Statutes (1960), the full text and designation of which is attached as Appendix B.

C. QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal:

Whether the unapportioned Texas gross receipts tax levied by Article 11.03 (Vernon's Civil Statutes "Taxation General")[1] measured by charges made for electricity in Texas violates the Commerce Clause[2] of the United States Constitution when applied to power generated (and taxable) in New Mexico and subsequently transmitted directly to Texas consumers. More specifically, the appeal questions whether the tax is unconstitutional under the Commerce Clause because:

---

[1]Tit. 122A Ch.11 Taxation General; ACTS 1959, 56th Leg. 3rd C.S. p. 187, ch. 1.

[2]Article 1, §8, Clause 3, U.S. Constitution:
"The Congress shall have Power... To regulate Commerce... among the several States."

(1) The tax creates the *risk* of multiple taxation. Is the *risk* of multiple taxation of interstate commerce enough to invalidate the tax, or must an *actual* multiple burden be shown, as held in the Court below?

(2) The tax fails to apportion the tax so as to exempt receipts attributable to interstate commerce, or to exempt income from purely interstate commerce solely attributable to Taxpayer's activities outside Texas.

(3) The tax is levied directly upon the activity of engaging in interstate commerce; or, stated another way, it is levied on an activity which is not a "local incident" separable from interstate commerce.

(4) The tax discriminates against interstate commerce and taxes the privilege of engaging in it.

D. STATEMENT OF THE CASE:

(1) Facts

Appellant, a Texas corporation, provides electrical energy from two generating plants, one at Anapra, New Mexico, and one at Newman, Texas, to consumers in Texas and New Mexico. Appellant's major revenue is receipts from charges for power consumed in El Paso, Texas. It was stipulated and found as fact in the trial court that during the contested period prior to this litigation, the New Mexico generating plant provided from 39 to 49 per cent of the electrical energy consumed in the three cities affected by the tax, (El Paso, Anthony and Van Horn). The percentages were based on calculations, because once the electricity is placed on the transmission lines it is impossible to dertermine the origin of any part of it. (See transcript of the record at page 37, hereafter abbreviated "Tr.").

Appellant owns and operates all generating and transmitting facilities and merchandises the electrical energy in question. No distributor or other third party intervenes between generation of the electricity in New Mexico and its consumption in Texas.

From 1942 through 1957, Appellant paid over a million dollars in gross receipts taxes to Texas under the statute here contested. (Tr. 52). In the same period it paid $226,418.96 gross receipts taxes on generation of electricity to New Mexico, a substantial part of which was the same energy taxed by Texas. (Tr. 41 and 52). The New Mexico statute (now repealed) is unquestionably constitutional under *Utah Power and Light Company v. Pfost, 286 U.S. 165, (1932)*, and is not contested here. It is, however, attached as Appendix C for the Court's information since it relates to the multiple burdens question.

At the trial, the following stipulations about the characteristics of electricity generally, and that involved here, were found as facts by the trial court (Tr. 37 and 99):

Electrical energy generated at the New Mexico plant flows across the state line without interruption at the speed of light (186,000 miles per second) directly to the ultimate consumer in Texas. (Tr. 37) Its generation, transmission, delivery and consumption take place in the same microsecond and for all practical purposes are simultaneous. (Tr. 37) The energy is not produced in advance of need and stored, and cannot be handled or packaged as a solid, liquid, or gas. (Tr. 37) If an unusually great share of electrical energy is suddenly consumed by the introduction of a high power-consumption device onto the supplying line, an immediate and almost instantaneous drop in voltage occurs. (Tr. 37)

Electric energy has no identifiable physical substance. The energy taken by the consumer which decreases temporarily the overall voltage in the supplying line, cannot, in any way, be distinguished from the energy on any other part of the line. (Tr. 37) Whereas it is possible, in theory, to dye or otherwise identify specific gas or water which is available under pressure in the consumer's lines next to the appliance or outlet which releases it for use, the electric energy is not a tangible, physical substance and cannot be so identified. (Tr. 37) The energy consumed by an electric light in a home in El Paso or Van Horn can be said to be electric energy which traveled directly to that point from the generator at the speed of light, or for any practical consideration, instantaneously. The flipping of a light switch in El Paso reduces (however imperceptibly and briefly) the total voltage over the entire length of the line. The energy travels interstate on Appellant's transmission lines from the generator directly to the filament at the speed of light. (Tr. 37) Appellant owns and controls the entire transmission process. (Tr. 39)

(2) How The Federal Question Was Raised in Proceedings Below

The federal question - constitutionality of the taxing statute under the Commerce Clause - was first raised by Appellant's protest letters, accompanying protested payments as required by Texas statute. (See Tr. 7 et seq. and Tr. 35). The same question was again raised in Plaintiff's pleadings at trial. (See Plaintiff's Original Petition, page 3, Tr. 4; Plaintiff's First Amended Original Petition, pages 3 and 4, Tr. 65 and 66; and Plaintiff's Second Amended Original Petition, pages 3, 4 and 5, Tr. 75, 76 and 77). The trial court impliedly upheld the constitutionality of the statute by granting judgment for the State (Tr. 85), and expressly did so in its conclusions of law

where it found: "That the Plaintiff . . . has not proved that the tax imposed by virtue of Article 11.03 . . . constitutes an undue burden on interstate commerce." (Tr. 99).

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, the Federal Constitutional question was raised by Appellant's Point of Error No. 1: "The district court erred in concluding that the tax imposed by Article 11.03 . . . under these facts, did not violate the Federal Constitution." This position was renewed in Appellant's reply brief and its motions for rehearing.

In the Supreme Court of Texas, Appellant's application for writ of error stated as Point of Error No. 1: "The Court of Civil Appeals erred in holding that the tax imposed by Article 11.03, Title 122A VACS, under these facts, does not violate the Commerce Clause of the Federal Constitution", and the same position was taken in supplemental briefs and motion for rehearing.

E. THE FEDERAL CONSTITUTIONAL QUESTION IS SUBSTANTIAL

Relying on this Court's decision in *General Motors Corp. v. Washington, 337 U.S. 436 (1964),* the Texas Court of Civil Appeals has held that a current *actual* multiple tax burden must be shown in order to prove a state tax constitutionally invalid. If that is a correct reading of the *General Motors* decision, then this appeal probably should be dismissed. But if this Court still adheres to the long established rule that the test of state tax validity is the *risk* of multiple tax burdens on intersate commerce, then the Court of Civil Appeals erred on a substantial federal question since a grossly incorrect test was applied to this tax.

In addition, this court has held in *Utah Power and Light Company v. Pfost, 286 U.S. 165 (1932)* that a state may constitutionally tax the generation of electricity destined for transmission across state lines. It did not rule then, and has not ruled since on the important question whether the receiving state may also tax the same electrical energy at its point of consumption and measure the tax by the same gross receipts or gross kilowatt hours as the generation tax, without apportioning the tax to relate it to the taxpayer's activities within the taxing state.

This court is respectfully urged to give plenary consideration to this case, with briefs and oral argument, for the following reasons:

(1) The "Risk" Test Has Been Rejected in The Court Below

The holding in the *General Motors* case does not specify what is meant by a tax which "places a burden upon interstate commerce in a constitutional sense." Does this mean that in every case an *actual existing* multiple burden must be shown at the time the question is raised, or when it is heard? If so, the General Motors decision is a dramatic departure from the Court's previous holdings.

That the *risk alone* is enough to invalidate the tax has not been questioned since *J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307, 311 (1938)*. See, in accord, *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 368 (by implication) (1954); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 44 n. 2 (1940); Freeman v. Hewit, 329 U.S. 249, 256 (1946); Joseph v. Carter and Weekes, 330 U.S. 422, 429 (1947); Gwin, White & Prince v. Henneford, 305 U.S. 434, 439 (1939); Hartman, State Taxation of Interstate Commerce*:

A Survey and an Appraisal, 46 Virginia Law Review 1051 at 1074, (1960).

If this Court has made such a departure from the previously established rule, which seems unlikely, then it has an opportunity to clarify the new test: What constitutes an actual multiple tax burden? Must the burden exist at the time the suit is filed? At the time it is first heard? At all stages of the proceeding? Or is any past actual multiple burden, such as the one shown here for the years 1942 through 1957, sufficient?

If there has been no change in the established rule that the risk alone invalidates the tax, then the lower court has clearly erred because of an incorrect reading of the *General Motors* case. If it did so err, the merits of this case favor a full hearing of it. Furthermore, the confusion of the lower court suggests that others may misinterpret the *General Motors* decision. Clarification of this point is desirable.

(2) The Question is Novel

The question is substantial also because no decision since the *Pfost* case, 286 U.S. 165 (1932), has determined whether the electricity there held taxable at generation may again be taxed by gross receipts at consumption. The question is particularly important where neither the state of generation nor the state of consumption has attempted to apportion the tax to business activity within the taxing state.

(3) The "Risk" Test is the Only Feasible Way to Apply "Multiple Burdens"

The established "risk" test is the only logical way to go about making case law in this area and should be preserved. Under an actual burdens approach an identical tax could be valid in one state and invalid in another,

depending upon the taxing statutes of surrounding states, and those taxing statutes are constantly changing. The infinite variations available in such fact situations would make intelligent reliance on precedent impossible. Furthermore, if the courts should begin applying such an "actual burdens" test, the result would almost surely be a race in which each state legislature would gobble up all taxable transactions in sight for its own benefit at the expense of the surrounding states. *See Federal Limitations on State Taxation of Interstate Business, 75 Harvard Law Review 965 (1962).* There is also the likelihood that compensating taxes levied to take up any slack in the taxes laid by surrounding states would create a disguised multiple taxation. *See 75 Harvard Law Review 965 (1962).*

(4) Recent Decisions Confirm the "Risk" Test

The *General Motors* decision confirms that "multiple taxation" is still impermissible, citing *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).* In that case, this Court applied the *risk* test saying that the test is "the substantial effects, *actual or potential,* of the particular tax in suppressing unduly the commerce." (emphasis added). This Court said futher, through Justice Clark: "Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly or by the *possibility of multiple taxation* resulting from other taxes of the same sort being imposed by other states." *347 U.S. 166* (emphasis added).

(5) The Tax is Laid on Mixed Commerce Without Apportionment, and is Measured by Gross Receipts

The Tax is laid, without any apportionment to reflect activities within the taxing state, on gross receipts from the delivery of electricity, part of which originates outside the taxing state. Because there is no apportionment

to local activities part of the tax falls directly upon the activity of engaging in interstate commerce; or, stated another way, it is levied upon an activity which is not a "local incident" separable from interstate commerce. [See Authorities collected in Appendix D at (1) and (5)].

In the past, this Court has wisely indulged a strong presumption against gross receipts taxes on the theory that they are more likely to result in unfair multiple taxation of interstate business. *See Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)*, and *U.S. Glue Co. v. Oak Creek, 247 U.S. 321 at 329 (1918)*. The *Northwestern* decision carefully distinguished the tax before the Court from "an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share", *358 U.S. 462*, and the *Oak Creek* opinion details the evils of a gross receipts tax as compared with a net income tax. *247 U.S. 329*. See *Fisher's Blend Station, Inc. v. Tax Comm'n, 297 U.S. 650 (1936)* and *J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307 (1938)*.

Numerous decisions of this Court firmly establish that a gross receipts tax levied on mixed (interstate and intrastate) commerce is invalid unless apportioned to those activities attributable to the taxing state. They follow the well founded presumption against gross receipts taxes as especially likely to create multiple tax burdens. *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), (dictum)*, citing with approval *U. S. Glue Co. v. Oak Creek, 247 U.S. 321, 329 (1918); Railway Express Agency, Inc. v. Virgina, 347 U.S. 359, 367 (1954); Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948); Joseph v. Carter and Weekes Stevedoring Co., 330 U.S. 422 (1947); Freeman v. Hewit, 329 U.S. 249 (1946)* ("direct unapportioned tax on gross receipts . . . has been definitely held beyond the state taxing power"). See also, *Hartman,*

State Taxation of Interstate Commerce: A Survey and an Appraisal 46 Va. L. Rev. 1051, 1105 (October, 1960); and numerous older cases collected in Appendix E.

(6) There is No "Local Incident" Sufficient To Support the Tax: It is Levied Directly on Interstate Commerce

The decision below necessarily rests on the proposition that the generation of electricity in one state, and its consumption in another, occurring, for any practical purpose simultaneously, are separate and distinguishable activities, "substantial economic factors" realistically separable from the interstate transmission, which are sufficient to support a local tax in each state. In *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954)* this Court said that a local incident sufficient to support a state tax must be a "substantial economic factor", and:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. [Citing Authority] And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce."

Futhermore, this court has held with relation to physical objects that "local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax." *Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, (1954).* See

also *Joseph v. Carter and Weekes Stevedoring Co., 330 U. S. 422 (1947)* and *Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1951).*

The incident taxed is, in fact, the service of supplying electrical energy interstate, and the economic effect of such a tax is not only conducive to extra taxation on interstate business which local commerce does not share, but has, in the past, actually created such an additional burden upon Appellant solely because it transacted its business across state lines.

(7) THE COURT BELOW CONFUSES DUE PROCESS AND COMMERCE CLAUSE TESTS

Again, apparently relying on this Court's decision in *General Motors Corp.v. Washington, 377 U.S. 437 (1964),* the Court below has applied the test whether "the state has given anything for which it can ask return", a due process clause test, in a case where only Commerce Clause questions are raised. (See Appendix A, page 5). The Court of Civil Appeals' confusion of the two tests suggests that others may so misinterpret the *General Motors* opinion, and that it could be clarified on this point also.

(8) The Tax Discriminates Against Interstate Commerce And Is Laid on the Privilege of Engaging In It.

Because of the risk of multiple burdens created by the tax, its measurement by gross receipts unapportioned to reflect activity within the taxing state, and its impact on an interstate transaction which cannot realistically be carved into "local incidents" sufficient to support the tax; it discriminates against interstate commerce and is laid on the privilege of engaging in it. [That the imposition of multiple burdens creates discrimination is established in *Spector Motors Service v. O'Connor, 340 U.S. 602, 609 (1951)*].

F. CONCLUSION

The decision below is clearly erroneous and is likely to create great difficulty in recognizing permissible state taxation under the Commerce Clause.

1. It holds that *actual* multiple tax burdens must be shown in order to invalidate a state tax.

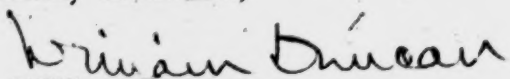
2. It holds that electricity may be taxed by gross receipts at the point of its consumption; that the tax need not be apportioned to reflect the taxpayer's activities within the taxing state. Taken in connection with *Utah Power and Light Co. v. Pfost, 286 U.S. 165 (1932)*, this means that an unapportioned gross receipts tax (or its equivalent) may be laid on both the generation and consumption of electricity occurring in different states, though the entire transaction involves exactly the same electrical energy and though it occurs in a split second. Again, taken with the *Pfost* case, the decision below means that the almost simultaneous interstate generation-transmission-consumption of electricity represents *three* distinct and realistically separable transactions which are "substantial economic factors" gross receipts taxes on two of which are not likely to create multiple tax burdens on the interstate business, that the "transmission" can be realistically separated from the generation at one end and the consumption at the other, and that *both* the near-instantaneous generation and consumption are valid local incidents which will support an unapportioned gross receipts tax in each state (even though the transmission itself is acknowledged to be an interstate transaction which is not taxable). So holding, it carries the *Pfost* analogy between electricity and physical goods to its ridiculous conclusion. It relies on *Pfost* decided in 1932, and *East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465*, decided in 1931, failing to consider that the important multiple burdens test was not adopted by the majority of this Court until 1938 in *Western Livestock v. Bureau of*

Revenue, 303 U.S. 250. [See *Hartman, State Taxation of Interstate Commerce: A Survey and an Appraisal, 46 Va. L. Rev. 1051 at 1074 (1960)*].

3. It confuses the Due Process Clause test of whether "the state has given anything for which it can ask return" which determines the state's right to levy *any* tax on this taxpayer (which right is undisputed here) with established Commerce Clause tests which determine the state's right to levy *this* tax. (See page 5 of Appendix A, and Appendix D).

4. Finally, its effect is to uphold a tax which unquestionably subjects this taxpayer to a greater burden than like businesses simply because it operates across state lines, erecting those domestic trade barriers which it is the purpose of the Commerce Clause to prohibit. It is therefore submitted that the decision of the Texas Court of Civil Appeals extends State taxing power beyond Constitutional limitations to the detriment of commerce between the states; that it employs clearly erroneous standards for testing the Constitutionality of such taxes; and that it is without valid precedent and completely novel, and will have far-reaching effects unless corrected. For these reasons the questions presented should be decided by this Court after oral argument and briefing on the merits.

Respectfully submitted,



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I, William Duncan, one of the attorneys for El Paso Electric Co., Appellant herein, and member of the Bar of the Supreme Court of the United States, hereby certify that, on the 23 day of July, 1965, I served copies of the foregoing Jurisdictional Statement on the other parties hereto by mailing copies in a duly addressed envelope, air mail postage prepaid, to the attorney for all defendants, the Attorney General of the State of Texas, to the attention of Gordon Cass, Box R, Capitol Station, Austin, Texas

W Duncan

William Duncan

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APPENDIX A: OPINION BELOW

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

NO. 11,270

EL PASO ELECTRIC COMPANY, APPELLANT

vs.

ROBERT S. CALVERT ET AL, APPELLEES

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT,

NO. 134,237, HONORABLE JACK ROBERTS, JUDGE

Appellant, El Paso Electric Company, the plaintiff in the trial court, is a Texas Corporation engaged in the business of supplying electric energy to several incorporated municipalities in Texas. It paid the occupation tax required of public utilities by Article 11.03, Title 122A. Revised Civil Statutes of Texas, for the second, third and fourth quarters for the year 1963 and the first quarter of the year 1964 under protest and thereafter brought suit against the State of Texas to recover these taxes.

Trial was before the court and the court entered judgment for the State of Texas.

We affirm the judgment of the trial court.

Appellant is a privately owned public utility serving several Texas cities with electric power which includes the incorporated cities of El Paso, Anthony and Van Horn, Texas. In addition it serves some outlying areas in Texas and New Mexico. Appellant has two generating plants. One is located near Anapra, New Mexico, known as the Rio Grande Station, and the other, located near Newman, Texas, is known as the Newman Station. Apppellant also owns and operates a system of transmission lines, transformer stations and other equipment used in distributing electric energy for sale at retail and wholesale rates. Some of the equipment is located within the city limits of El Paso, Anthony and Van Horn, Texas.

Part of the power sold by appellant in Texas is generated in New Mexico at the Rio Grande Station; the remainder is generated in Texas at the Newman Station.

Article 11.03, V.C.S., provides for an occupation tax on utility companies selling electric power to incorporated cities or towns in the State of Texas, the pertinent portions of which are set out below.[1]

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[1] [Footnote 1 — portions of the contested statute — is omitted. See Appendix B].

Appellant is before this Court on two points of error: one, that the district court erred in concluding that the contested tax, under these facts, did not violate the Federal Constitution; and two, that the court erred in concluding that the tax did not violate the Texas Constitution.

With respect to the Federal Constitution, appellant argues that the tax in question is a tax in interstate commerce and creates the risk of a multiple tax burden on an interstate business.

Under the facts before us we find that over fifty per cent of the electric energy sold in Texas is generated in Texas while energy generated in Texas is transmitted into New Mexico and sold there. Conversely a portion of the energy generated in New Mexico crosses into Texas and is sold here while the remainder is sold in New Mexico. As we understand the facts there is a commingling of the electricity from its original sources of generation after which the larger portion is sold in Texas and the remainder in New Mexico.

We hold that under the statute in question the appellant is in the public utility business in El Paso, Anthony and Van Horn, Texas and that while a certain portion of the electricity used in that business passes from one State to another, the facts of the operation cause it to fall under that class of cases most recently exemplified by the United States Supreme Court in General Motors v. Washington, 84 S. Ct. 1564 (1964) wherein the Court stated:

> " 'It is beyond dispute,' we said in Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450 (1959) at 458, 'that a State may not lay a tax on the "privilege" of engaging in interstate commerce.' But that is not this case. To so contend here

is to overlook a long line of cases of this Court holding that an in-state activity may be a sufficient local incident upon which a tax may be based. As we said in Spector Motor Service, Inc., v. O'Connor, 340 U.S. 602, 609 (1951), 'the State is not precluded from imposing taxes upon other activities or aspects of this (interstate) business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State.' This is exactly what Washington seeks to do here and we cannot say that appellant has shown that its activities within the State are not such incidents that the State can reach. North Co. v. Department of Revenue, supra at 537."

In East Ohio Gas Co. v. Tax Comm., 283 U.S. 465 (1931), the Supreme Court had before it a tax being imposed on corporations engaged in the business of supplying gas for light, heat or power in the State of Ohio at the rate of 1.35 per cent on all gross receipts on its intrastate business. The appellant in the Ohio case furnished some communities gas exclusively from outside the State of Ohio, to some, gas only from Ohio, and to others, a mixture of that from West Virginia and Ohio. The facts in that case are similar to those here. In Ohio the Court said:

"It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. Pullman Co. v. Richardson, 261 U.S. 330, 338. New Jersey Tel. Co. v. Tax Board, 280 U.S. 338, 346. And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction, in order to be valid, must be imposed solely on account of the intrastate business

done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition, and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. Sprout v. South Bend, 227 U.S. 163, 170, 171 and cases cited."

The tax in the case at bar meets the test laid down by the United States Supreme Court in that portion of the Ohio case quoted above. The interstate aspect of the business is separate and distinct from its intrastate business or business of a distinctly local nature.

The Court continues in Ohio:

> "The Ohio statute does not purport to affect interstate commerce. The specified excise taxes are laid for the privilege of carrying on intrastate business. The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in interstate commerce."

Also see McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, (1940).

Appellant contends that the New Mexico generated energy flows across the State line without interruption at the speed of light directly to the ultimate consumer. That its generation, transmission, delivery and consumption take place in the same microsecond and for all practical purposes are simultaneous. This may be true from a technical viewpoint; however, in Utah Power and Light v. Pfost, 286 U.S. 165 (1932), the Supreme Court held that while generation and transmission of electrical energy are substantially instantaneous they are essentially separable and distinct operations. Consequently, the sale of electricity

to users in the Texas towns is separable and distinct from the transmission thereof and is essentially local in character for tax purposes.

It would serve no useful purpose to discuss the many cases cited by appellant in its brief as they are, for the most part, cases dealing with the phohibition on the part of the states from imposing a tax on the privilege of engaging in interstate commerce. These cases are not in point here.

The Supreme Court of the United States has stated that in a situation such as the case before us the question is whether the State has given anything for which it can ask return. Texas has exercised its power of taxation in relation to the opportunities which it has given appellant such as the substantial privilege of carrying on business within its borders with the attendant protection and other benefits that it has conferred by the fact of being an orderly and civilized society. The fact that a tax is contingent upon events brought to pass without the State does not destroy the connection between such a tax and transactions within the State for which the tax is exacted. Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940).

Nor do we feel that the "risk of multiple taxation" argument advanced by appellant is valid. While New Mexico did impose a tax on generation of electrical energy several years ago, such a tax was discontinued and at present there is no tax on generation. This point was raised in General Motors v. Washington, cited above, where General Motors claimed that a sales tax on their products in Washington was invalid, among other reasons, because some of its products taxed by Washington were manufactured in St. Louis where a license tax measured by sales before shipment is levied. In rejecting this argument the Court said:

> "Thereafter, in Northwestern States Portland Cement Co. v. Minnesota, supra, at 463, we held that

'in this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.' Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax, Cf. International Harvester Co. v. Evatt, 329 U.S. 416, 421-423 (1947). And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of 'multiple taxation.' e. g. Northwestern States Portland Cement Co. v. Minnesota, supra, and we adhere to that position."

In the case at bar, the sales to local consumers in Texas are taxed by Texas, the energy is used and cannot be again taxed. The tax is levied on a segment of the appellant's several activities that is local to Texas and has no bearing on its interstate activity or activities attributable to New Meico. We overrule this point.

We likewise overrule appellant's contention that the contested tax violates Art. 8, Section 2, of the Texas Constitution, which provides that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax."

In Dallas Gas Company v. State, Tex. Civ. App., 261 S.W. 1063, writ refused, this Court in affirming a tax recovery by the State on occupation taxes imposed on those engaged in the wholesale oil business in Texas, stated that under the constitutional provision above quoted, the tax shall be equal and uniform upon the same class and that the law cannot operate unequally upon subjects between which there is no real difference to justify separate treatment.

Here the tax in question operates on all public utilities operating in the described towns or cities, is equal and uniform as to the general class covered and is not in violation of the constitutional provision quoted. As stated above, the appellant is being taxed on its local Texas operation as a public utility and as such is being treated equally with any other Texas public utility. It is for this reason that State v. Humble Pipe Line Co., 112 Tex. 375; 247 S.W. 1082 cited by appellants is not in point. In that case a gross receipt tax was levied on interstate pipe lines as well as intrastate pipelines. The Court held that since the tax on interstate pipelines was unconstitutional the remaining tax on intrastate pipelines would place an unequal burden on the same class of subjects consequently invidious to Art. 8, Sec. 2 of the Texas Constitution. The tax was not on any operation of the interstate pipeline that could be classed as local in nature but fell directly upon its interstate operation.

John C. Phillips, Associate Justice

Affirmed

Filed: December 2, 1964.

APPENDIX B: CONTESTED STATUTE

The full text of the contested statute follows:

"Art. 11.03 Gas, Electric Light, Power or Water Works

(1) Each individual, company, corporation, or association owning, operating, managing or controlling any gas, electric light, electric power, or water works, or water and light plant, located within any incorporated town or city in this State, and used for local sale and distribution in said town or city, and charging for such gas, electric

lights, electric power, or water, shall make quarterly, on the first day of January, April, July, and October of each year, a report to the Comptroller under oath of the individual, or of the president, treasurer or superintendent of such company, or corporation, or association, showing the gross amount received from such business done in each such incorporated city or town within this State in the payment of charges for such gas, electric lights, electric power, or water for the quarter next preceding. Said individual, company, corporation, or association, at the time of making said report for any such incorporated town or city of more than one thousand (1,000) inhabitants and less than two thousand, five hundred (2,500) inhabitants, according to the last Federal Census next preceding the filing of said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date equal to .581% of said gross receipts, as shown by said report; and for any incorporated town or city of more than two thousand, five hundred (2,500) inhabitants and less than ten thousand (10,000) inhabitants, according to the last Federal Census next preceding the filing of said report, the said individual, company, corporation, or association at the time of making said report shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date an amount equal to 1.07% of said gross receipts, as shown by said report; and for any incorporated town or city of ten thousand (10,000) inhabitants or more, according to the last Federal Census next preceding the filing of said report, the said individual, company, corporation, or association, at the time of making said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date an amount equal to 1.997% of said gross receipts, as shown by said report. Nothing herein shall apply to any such gas, electric light, power or water works, or water and light

plant, within this State, owned and operated by any city or town, nor to any county or water improvement or conservation district.

(2) Nothing herein shall be construed to require payment of the tax on gross receipts herein levied more than once on the same commodity, and where the commodity is produced by one individual, company, corporation, or association, and distributed by another, the tax shall be paid by the distributor alone.

(3) No city or other political subdivision of this State, by virtue of its taxing power, proprietary power, police power or otherwise shall impose an occupation tax or charge of any sort upon any person, corporation, or association required to pay an occupation tax under this Article. Nothing in this Article shall be constructed as affecting in anyway the collection of ad valorem taxes authorized by law; nor impairing or altering in any way the provisions of any contracts, agreements, or franchises now in existence, or hereafter made between a city and a public uility, relating to payments of any sort to a city. Nothing in this Article shall be construed as prohibiting an incorporated city or town from making a reasonable charge, otherwise lawful, for the use of its streets, alleys, and public ways by a public utility in the conduct of its business, and each such city shall have such right and power; but any such charges, whether designated as rentals or otherwise, and whether measured by gross receipts, units of installation, or in any manner, shall not in the aggregate exceed the equivalent of two per cent (2%) of the gross receipts of such utility within such municipality derived from the sale of gas, electric energy, or water. Any special taxes, rentals, contributions, or charges accruing after the effective date of this Act, under the terms of any pre-existing contract or franchise, against any utility paying an occupation tax under this

Article, when paid to any such city, shall be credited on the amount owed by such public utility on any charge or rental imposed for the use of streets, alleys, and public ways, levied by ordinance, and accruing after the effective date of this Act; provided that where valid ordinances have been enacted heretofore by cities imposing a charge or rental in excess of two per cent (2%) of the gross receipts of such utilities, nothing herein shall be construed so as to prohibit the collection of such sum as may be due said cities thereunder from the date of said ordinance up to the time this Article shall become effective.

(4) And provided further that utilities paying an occupation tax under this Article shall not hereafter be required to pay the license fee imposed in Article 5a, House Bill No. 18, Chapter 400, Acts of the Forty-fourth Legislature, for the privilege of selling gas and electric appliances and parts for the repairs thereof, in towns of three thousand (3,000) or less in population according to the next preceding Federal Census. Acts 1959, 56th Leg. 3rd C.S. p. 187, ch. 1."

APPENDIX C: NEW MEXICO STATUTE

The relevant parts of the New Mexico tax effective from 1942 to 1957 are:

"72-16-4. Privilege Taxes Levied—Measured By Amount of Business.—There is hereby levied, and shall be collected by the Bureau of Revenue, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging or continuing, within the state of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows: . . . "

"B. At an amount equal to one-fourth of one per cent of the gross receipts of the business of every person engaging or continuing in each or any or all of the businesses of manufacturing, smelting, refining, reducing, processing, compounding, fabricating, packing, preserving, distilling, preparing for sale or commercial use, or the making of wares, commodities or material products by hand or machinery, *including the generation of electricity;* provided that the tax provided by this paragraph shall be at the rate of one half of one percent of the gross receipts of the business of every person engaging or continuing in the business of smelting, leaching, refining, reducing, or processing oil, natural gas, carbon dioxide gas, potash, copper, gold, silver, limestone, sand, gravel or other metalliferous or nonmetalliferous products or combinations, or compound of mineral products.

The measure of the tax imposed by this paragraph is the value of the entire production in this state, regardless of the place of sale or the fact that delivery may be made to points outside of the state." (emphasis added).

APPENDIX D: BASIC CASES

Article 1 Section 8 of the United States Constitution, includes the "Commerce Clause", which gives to Congress the power to regulate commerce among the several states. It was enacted to secure freedom of trade between the various states and to protect interstate commerce from discrimination by state action. See, e. g., *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 at 458 (1959); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 at 170 (1954); McLeod v. Dilworth, 322 U.S. 327, 330, 331 (1944).*

The U.S. Supreme Court has held that the Commerce Clause grants exclusive power to the Congress to regulate interstate commerce. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, supra at 458; Gibbons v. Ogden, 9 Wheat 1; 6 L.Ed. 23 (1824);* and that despite Congressional failure to act on the subject in the area of taxation, interstate commerce must be free from any direct restrictions imposed by the states. *Northwestern States Portland Cement Co., supra at 458.*

(1) Except for a net income tax, where the taxed income from a foreign corporation is apportioned fairly to the activities of that corporation within the taxing state, no tax directly upon interstate commerce itself is permissible. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)* (a levy must not be discriminatory and must be properly apportioned to local activities within the taxing state forming sufficient "nexus" to support the same); *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 393 (1951); Spector Motor Service v. O'Connor, 340 U.S. 602, 610 (1951); Memphis Natural Gas Company v. Stone, 335 U.S. 80, 88 and 89 (1948); Nippert v. Richmond, 327 U.S. 416, 423 (1946); Freeman v. Hewit, 329 U.S. 249, 256 (1946)* (state not allowed "one single tax worth of direct interference with the free flow of commerce"); *J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307, 311 (1938); Fisher's Blend Station, Inc. v. Tax Comm'n, 297 U.S. 650 (1936).* See in accord, *46 Va. L. Rev. 1087, n.133 (1960).* From this rule there has evolved a related second test, requiring validly separable "local incidents"—realistically severable local activities—to be isolated from the stream of commerce in order to support

a state levy. This requirement, now treated as a separate test, is set out in (5) following.

(2) No tax is valid if it creates the risk of a "multiple burden" upon interstate commerce to which intrastate commerce is not subject. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 367 (1954); Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948); Nippert v. Richmond, 327 U.S. 416, 428 n.19 (1946); Freeman v. Hewit, 329 U. S. 249, 254 (1946); McLeod v. Dilworth, 322 U.S. 327 (1944); McGoldrick v. Berwind-White Coal Mining Co. 309 U.S. 33 (1940); Treasury of Indiana v. Wood Preserving Corp., 313 U.S. 62 (1941); Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939); Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939); J.D. Adams Manufacturing Co. v. Storen, 304 U.S. 307, 311 (1938); Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938); See 46 Va. L. Rev. 1074-82 (1960).*

(3) No tax is valid if it is one upon the "privilege" of engaging in interstate commerce. See e.g. *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1951); Spector Motor Service v. O'Connor, 340 U.S. 602, 609 (1951); Nippert v. Richmond, 327 U.S. 416, 428 (1946); Freeman v. Hewit, 329 U.S. 249 (1946)* (a direct unapportioned gross receipts tax "has been definitely held beyond the state taxing power"); *Gwin, White & Prince v. Henneford, 305 U.S. 434, 441 (1939). See 46 Va. L. Rev. 1051 (1960).* And it has been declared that if the tax is

upon the "privilege", then it is invalid no matter how fairly it is apportioned to intrastate business. *Spector Motor Service v. O'Connor, 340 U.S. 602 at 609 (1951)* (indicating that a tax becomes discriminatory by imposing "undue burdens" on interstate commerce).

(4) No tax is valid which discriminates against interstate commerce. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 393 (1951); Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87 (1948); Nippert v. Richmond, 327 U.S. 416, 428 (1946).*

(5) No tax is valid if it is upon an "incident" which is not some realistically separable local activity which can form the nexus of a state levy. *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 393 (1951); Spector Motor Service v. O'Connor, 340 U.S. 602, 610 (1951); Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87 (1948); Nippert v. Richmond, 327 U.S. 416, 423 (1946); Freeman v. Hewit, 329 U.S. 249, 253 (1946).* It must be a validly separable local activity, and not a fictitious label given to an integral part of the interstate commerce; See *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157 (1954); Spector Motor Service v. O'Connor, 340 U.S. 602 (1951); Nippert v. Richmond, 327 U.S. 416 (1946);* it must be a "substantial economic factor"; *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 169 (1954);* and it must be one which does not lend itself to repeated exactions in other states. *Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 169 (1954). Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87 (1948)* states: "But the choice of local incident for the

tax, without more, is not enough. There are always convenient local incidents in every interstate operation. [Citing *Nippert v. Richmond*] The incident selected should be one that does not lend itself to repeated exactions in other states." See *Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 429 (1947); Nippert v. Richmond, 327 U. S. 416 (1946)*, and *Freeman v. Hewit, 329 U.S. 249 (1946)*, to the same effect.

(6) No tax is valid if it is a direct imposition or restriction on intersate commece or it is an interference with the free flow of commerce. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 at 458 (1959)* and *Gibbons v. Ogden, 9 Wheat 6, L.Ed. 23 (1824)*.

In addition to those tests the Court has used other criteria for state tax validity. Because of the likelihood that gross receipts taxes will fail to meet one or more of the above tests, the Court has indulged a strong presumption against them generally, whether apportioned or not, and against unapportioned taxes, whether upon gross receipts or not. See, e.g., *Northwestern States Portland Cement Co. v. Minnesota, supra* and *Freeman v. Hewit, 329 U.S. 249 at 256 (1946), discussion at (5) above, and Appendix E.*

APPENDIX E:*

UNAPPORTIONED GROSS RECEIPTS TAXES HELD INVALID (ADDITIONAL AUTHORITY)

Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939); J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307 (1938), Puget Sound Stevedoring Co. v.

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*Continued from authorities cited in discussion at E (5) of text above.

State Tax Comm'n., 302 U.S. 90 (1937); Fisher's Blend Station, Inc. v. State Tax Comm'n., 297 U.S. 650 (1936); Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917); Meyer v. Wells Fargo Co., 223 U.S. 298, 300 (1912) (Tax invalid event though an attempt was made to apportion it to "per cent of gross receipts as its business done within the state bears to the whole of its business", opinion by Holmes, J.); *Kansas City F.S. & M. Ry. Co. v. Botkin, 240 U.S. 227 (1916) (dictum); Galveston H. & S. A. R. Co. v. Texas, 210 U.S. 217 (1908); Western Union Tel. Co. v. Alabama Board of Assessment, 132 U.S. 472 (1889); Ratterman v. Western Union Tel. Co., 127 U. S. 411 (1888); Leloup v. Mobile, 127 U.S. 640 (1888); Fargo v. Michigan, 121 U.S. 230 (1887); Philadelphia & S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887).*

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